Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

No. 99-1871

In The

Supreme Court of the United States

NOV 13, 2000

UNITED STATES DEPARTMENT
OF THE INTERIOR, et al.,

Petitioners,

v.

KLAMATH WATER USERS
PROTECTIVE ASSOCIATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICI CURIAE OF THE KLAMATH TRIBES, THE CHIPPEWA CREE TRIBE OF THE ROCKY BOYS' RESERVATION, THE TULE RIVER TRIBE, NATIONAL CONGRESS OF AMERICAN INDIANS, ET AL. IN SUPPORT OF PETITIONERS

(Additional Amici Listed At Conclusion Of Brief)

TRACY A. LABIN*
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, CO 80302
(303) 447-8760

Counsel for the National Congress of American Indians, the Klamath Tribes, the Chippewa Cree Tribe of the Rocky Boys' Reservation, and the Tule River Tribe

**Counsel of Record for All Amici*

November 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

51pp

QUESTION PRESENTED

Was the Freedom of Information Act intended to abrogate the federal-tribal trust relationship and eliminate discovery privileges accorded all other litigants by subjecting to disclosure documents exchanged between the United States and Indian tribes about trust resources owned by the United States for the benefit of tribes?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. DISCLOSURE OF THE DOCUMENTS IN THIS CASE WOULD CONTRAVENE THE TRUSTEESHIP WHICH THE COURT AND CONGRESS HAVE DEFINED AND WHICH HAS BEEN THE BASIS OF THE UNITED STATES' RELATIONSHIP WITH INDIAN TRIBES FOR THE PAST TWO CENTURIES 5

A. There Is A Clearly Established Federal-Tribal Trust Relationship 5

1. The Federal Government Has Trust Responsibilities In The Management Of Tribal Trust Resources 5

2. The United States Particularly Bears Comprehensive Trust Duties Regarding Tribal Water Rights 9

B. The Trust Relationship Requires That The United States Communicate And Communicate Confidentially With Tribes About Tribal Trust Resources 12

C. FOIA Does Not Abrogate Tribal Rights To Confidential Consultations With The United States about Tribal Trust Resources 15

TABLE OF CONTENTS – Continued

Page

II. DISCLOSURE OF THE DOCUMENTS IN THIS CASE CONTRAVENES EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT AND MAKES INDIAN TRIBES THE ONLY PARTIES IN THE UNITED STATES UNABLE TO RELY ON DISCOVERY PRIVILEGES 19

A. Congress Intended To Ensure Open And Frank Government Discussions By Protecting Executive Deliberations, Attorney-Client Communications And Work Product Under FOIA Exemption 5 19

B. Communications Between The Federal Government And Tribes Regarding Tribal Trust Resources Fall Within Exemption 5 20

1. Regarding The Management Of Tribal Trust Assets, Federal-Tribal Communications Meet The Functional Test Of Exemption 5 20

2. The Documents At Issue Here Concern Executive Deliberations And Attorney-Client Communications And Are Thus The Kind Of Documents Normally Protected By Exemption 5 24

C. Neither The Tribes' Interest In The Subject Matter Of The Department's Deliberations Nor The Possibility Of Federal-tribal Disputes Undermines Application Of FOIA Exemption 5 26

1. Tribal Interest In The Subject Of The Communications Does Not Render Their Communications Ex Parte 27

2. The Tribes Are Not Adversaries Of The Federal Government In This Case 28

TABLE OF CONTENTS – Continued

Page

D. Failure To Apply FOIA Exemption 5 Here Would Sanction Use Of FOIA As A Substitute For Discovery In Contravention Of This Court's Warnings..... 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Air Line Pilots Ass'n v. O'Neil, 499 U.S. 65 (1991) 14

Arizona v. California, 373 U.S. 546 (1963)..... 10

Arizona v. California, 460 U.S. 605 (1982)..... 10, 11, 13

Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) 4, 10

Baldridge v. Shapiro, 455 U.S. 345 (1982) 30

CNA Financial Corp. v. Donovan, 830 F.2d 1132 (D.C. Cir. 1987).....21, 22

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1985) 18

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831) 6

Choate v. Trapp, 224 U.S. 665 (1912) 6, 17

Choctaw Nation v. United States, 119 U.S. 1 (1886) 6

Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976) 10

County of Madison v. United States Dep't of Justice, 641 F.2d 1036 (1st Cir. 1981) 28, 29

County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985) 7, 8

County of Yakima v. Yakima Nation, 502 U.S. 251 (1992) 18

Delaware Tribal Business Comm. v. Weeks, 430 U.S. 73 (1977) 7

TABLE OF AUTHORITIES – Continued

Page

EPA v. Mink, 410 U.S. 73 (1973) 22

FBI v. Abramson, 456 U.S. 615 (1982) 19

FTC v. Grolier Inc., 462 U.S. 19 (1983) 19, 22, 25

Federal Open Market Comm. v. Merrill, 443 U.S. 340 (1979) 20, 24

Fellows v. Blacksmith, 60 U.S. (19 How.) 366 (1857) 6

Formaldehyde Inst. v. Dep't of Health & Human Services, 889 F.2d 1118 (D.C. Cir. 1989) 21

Heckman v. United States, 224 U.S. 413 (1912) 6, 10

Hickman v. Taylor, 329 U.S. 495 (1947) 25

Indian Law Resource Center v. Dep't of the Interior, 477 F. Supp. 144 (D.D.C. 1979) 14

John Doe Agency v. John Doe Corp., 493 U.S. 146 (1989) 29

Jones v. Meehan, 175 U.S. 1 (1899) 7, 17

Lane v. Pueblo of Santa Rosa, 249 U.S. 110 (1919) 6

McClanahan v. Arizona Tax Comm'n, 411 U.S. 164 (1973) 18

Menominee Tribe v. United States, 391 U.S. 404 (1968) 16, 17

Montana v. Blackfeet Tribe, 471 U.S. 759 (1985) 7

Morton v. Mancari, 417 U.S. 535 (1974) 7

Morton v. Ruiz, 415 U.S. 199 (1974) 7

Navajo Tribe of Indians v. United States, 624 F.2d 981 (Cl.Ct. 1980) 9

TABLE OF AUTHORITIES – Continued

Page

Nixon v. Administrator of General Services, 433 U.S. 425 (1977) 23

NLRB v. Amax Coal Co., 453 U.S. 322 (1981) 14

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978) 29

NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975) 19, 20, 22, 24, 29, 30

Nevada v. United States, 463 U.S. 110 (1983) 4, 7, 11, 13, 14, 28

Pegram v. Herdrich, 120 S. Ct. 2143 (2000) 14

Pension Fund v. Cent. Transp. Inc, 472 U.S. 559 (1985) 15

Pigeon River Co. v. Cox Co., 291 U.S. 138 (1934) 17

Public Citizen, Inc. v. Department of Justice, 111 F.3d 168 (D.C. Cir. 1997) 23, 29

Renegotiation Bd. v. Bannercroft Clothing Co., 415 U.S. 1 (1974) 30

Ryan v. Department of Justice, 617 F.2d 781 (D.C. Cir. 1980) 21, 22, 23

Seminole Nation v. United States, 316 U.S. 286 (1942) 7, 13

Shoshone Tribe v. United States, 299 U.S. 476 (1937) 6

Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n, 121 F.3d 1303 (9th Cir. 1997) 15

Texas v. Interstate Commerce Comm'n, 889 F.2d 59 (5th Cir. 1989) 21

TABLE OF AUTHORITIES – Continued

Page

Tiger v. Western Investment Co., 221 U.S. 286 (1911) 6

Tulee v. State of Washington, 315 U.S. 681 (1942)..... 7

United States v. Algoma Lumber Co., 305 U.S. 415 (1939) 7

United States v. Candelaria, 271 U.S. 432 (1926).....6, 7

United States v. Creek Nation, 295 U.S. 103 (1935) ..6, 13

United States v. Dion, 476 U.S. 734 (1987)...5, 7, 16, 17, 18

United States v. Julian, 486 U.S. 1 (1988).. 19, 20, 23, 29

United States v. Kagama, 118 U.S. 375 (1886) 6, 7

United States v. Mason, 411 U.S. 391 (1973) 7, 13

United States v. Mitchell, 463 U.S. 206 (1983).... 7, 9, 13

United States v. Nice, 241 U.S. 591 (1916) 6

United States v. Payne, 264 U.S. 446 (1924).....6, 16

United States v. Ramsey, 271 U.S. 467 (1926) 7

United States v. Sandoval, 231 U.S. 28 (1913) 7

United States v. Santa Fe Pacific R.R. Co., 314 U.S. 339 (1941).....6, 16

United States v. Sioux Nation, 448 U.S. 371 (1980) 7

United States v. Weber Aircraft Corp., 465 U.S. 792 (1984) 19, 29, 30

Upjohn Co. v. United States, 449 U.S. 383 (1981)..... 25

Washington v. Washington Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979)..... 16

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 6

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

2 U.S.C. § 1534(a) 12

25 U.S.C. § 162(d) 8

25 U.S.C. § 175 8

25 U.S.C. § 177 8

25 U.S.C. §§ 323-26 8

25 U.S.C. §§ 396, 396a-96g 8

25 U.S.C. §§ 406-07 8

25 U.S.C. §§ 415-15d 8

25 U.S.C. § 476 12

25 U.S.C. §§ 2101-08 8

30 U.S.C. §§ 1701-57 8

Freedom Of Information Act, 5 U.S.C. § 552 (FOIA) ..... *passim*

McCarran Amendment, 43 U.S.C. § 666 10

MISCELLANEOUS

Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims 55 Fed. Reg. 9223 (Dep't Interior, 1990) 9, 11

Dep't of Interior, Departmental Manual, pt. 303, ch. 2, pt. 512, § 2.2 (1995) 9, 12

Executive Order No. 13,084, 3 C.F.R. 150, *reprinted at* 25 U.S.C.A. § 450, Hist. Notes (West Supp. 2000) 12

TABLE OF AUTHORITIES – Continued

Page

Executive Order No. 13,175 of November 6, 2000, "Consultation and Coordination with Indian Tribal Government" 8

Felix S. Cohen, Handbook of Federal Indian Law, 224 (1982 ed.) 17

George G. Bogert & George T. Bogert, Law of Trusts and Trustees (2d rev. ed. 1993).....14, 15

H.R. Rep. No. 89-1497 (1966) 20, 24, 29

Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994)..... 8

Restatement (Second) of Trusts.....14, 15

Secretarial Order No. 3215 (Apr. 28, 2000)..... 12

S. Rep. No. 89-813 (1965) 20, 21, 22, 24

Statement Reaffirming the Government-to-Government Relations Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662 8

Statement on Indian Policy, 1993 Pub. Papers 96 9

Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564..... 9

2A Austin W. Scott & William F. Fratcher on Trusts (4th ed. 1987).....14, 15

INTEREST OF AMICI CURIAE[1]

Amici are 102 federally recognized Indian tribes and two national Indian organizations. All amici tribes must work closely with the United States in managing and protecting many of their natural resources because the tribes do not have sole control over them as they are held in trust by the United States. Particularly, like the Klamath Basin Tribes here, many amici tribes are currently involved in or subject to pending basin-wide, state general stream adjudications. Within the context of those general stream adjudications, some of the tribes are negotiating with the respective states and state authorized water users to attempt to resolve the complex issues surrounding the extent and nature of their water rights. In the course of these negotiations and in preparation for litigation, the United States, primarily through the Bureau of Indian Affairs, has participated and worked with the tribes and has received extensive confidential information including tribal views on the nature, extent and legal grounds in support of their water right claims. The tribes maintain a significant interest in ensuring that the confidential information exchanged between themselves and the federal agency acting as their trustee concerning a broad array of issues involved in the negotiation, litigation and settlement of their water right claims remains out of the reach of adversaries, except

---

[1] Counsel for Petitioner and Counsel for Respondent both consent to the filing of the Brief of Amici. Their letters are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amici Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

within traditional litigation discovery rules. Moreover, these tribes (as well as states, state authorized water users and the United States) maintain an interest in assuring that the negotiation processes being pursued throughout the West move forward toward successful resolution. Without coordination between the United States and these tribes, which is dependent upon confidential communications, the likelihood of negotiating a resolution to water disputes is substantially diminished and the likelihood of extensive and lengthy litigation is substantially increased.

If communications between beneficiary and fiduciary regarding trust resources are subject to disclosure under the Freedom of Information Act, 5 U.S.C. § 552 (FOIA), amici tribes will be put to a Hobson's choice regarding management and protection of trust resources upon which they depend for their economic, physical, and spiritual well-being. Tribes will be forced to either (1) refuse to communicate with their trustee the United States about the resources or (2) communicate with the trustee knowing that all such communication will be divulged by the trustee upon request.

This result is contrary to federal law regarding both the trusteeship and exemptions from FOIA articulated by Congress. Such a result is deeply unjust and incorrect because it ignores realities of the trusteeship with which amici must live. Amici urge this Court to decide this case consistently with the federal-tribal trust relationship as it has been described by the Court, as it works in practice, and as it affects the lives and property of Indian people. Amici respectfully urge the Court to protect the confidential communications between trustee and beneficiary

regarding trust resources and to hold that such communications are not disclosable under FOIA.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case arises from the United States' actions in its fiduciary capacity regarding the water rights of Klamath Basin Indian Tribes – the Klamath, Yurok, Hoopa Valley, and Karuk Tribes (Tribes) – in both a general stream adjudication in Oregon and in federal administrative proceedings in the Klamath Basin in Oregon and California. For over a decade, the United States has been working closely with the Tribes to establish and, where appropriate, to quantify the Tribes' right to federally reserved trust water.

Under FOIA, the Respondents – whose interest in water is in direct competition with the Tribes – sought disclosure of confidential communications between the United States and the Tribes regarding this work. The Court of Appeals for the Ninth Circuit held that Respondents are entitled to the requested documents, which leaves Indian tribes with the Hobson's choice of either not communicating with their fiduciary or communicating knowing that sensitive documents will be subject to disclosure.

Either way, any meaningful trusteeship is defeated. The first alternative – refusal of communication – renders the United States incapable of discharging its fiduciary duties. The second alternative – communication with risk of disclosure – guarantees that tribes' interests in proper federal management of their resources will be compromised. Because of the risk of disclosure, communication of information and opinions in this context would be

quite guarded, and the resulting management would not be effective.

The trusteeship, rather than being a protection, becomes an enormous liability and puts tribes in a worse position than any other resource user. Competitors for use of resources would have unfettered access to any documented federal-tribal communications, while there would be no reciprocal access by the tribes or the government to corresponding documentation of the competitors. In essence, other litigants would still have the benefit of discovery privileges but Indian tribes would not. Such a result is not only patently unfair, but it is contrary to both federal-tribal trust law, as well as FOIA law.

Under the well-established federal-tribal trust relationship, the United States holds legal title for Indian resources. As legal owner, the United States often exerts pervasive control over the trust resources, and thus assumes fiduciary duties for those resources – as is certainly the case with the water resources at issue here. Indeed, in the present context of water rights, the trusteeship means that the tribes have no choice in defending their rights but to work closely with the United States, for better or worse. Tribal water resources are generally owned by the United States which must submit tribal water rights for adjudication in state or federal forums as it sees appropriate, with or without the tribes' consent. *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). And the tribes will be bound by the outcome no matter how detrimental to their interests. *Nevada v. United States*, 463 U.S. 110 (1983).

The fiduciary relationship requires that the United States communicate with the tribes for whom it owns the resources and assures the tribes' right to confidentiality in such communication. As this Court has consistently

held, tribal rights are not construed to be abrogated by statutes of general applicability, unless Congress has made its intent to do so clear and plain, *see, e.g., United States v. Dion*, 476 U.S. 734 (1987) – something that FOIA just does not do.

Secondly, the trust relationship between the tribes and the federal government about tribal trust resources fits within the functional test of FOIA Exemption 5, which exempts from disclosure documents normally privileged in the discovery context. The documents at issue here clearly meet the requirements of non-discoverable documents and are exempt under discovery privileges. Disclosure here would allow adversaries of Indian tribes to circumvent established rules of discovery accorded all other litigants to gain access to privileged documents. Again, not only is such a result unfair, it contravenes well-established law of this Court and must not be allowed to stand.

ARGUMENT

I. DISCLOSURE OF THE DOCUMENTS IN THIS CASE WOULD CONTRAVENE THE TRUSTEESHIP WHICH THE COURT AND CONGRESS HAVE DEFINED, AND WHICH HAS BEEN THE BASIS OF THE UNITED STATES' RELATIONSHIP WITH INDIAN TRIBES FOR THE PAST TWO CENTURIES

A. There Is A Clearly Established Federal-Tribal Trust Relationship

1. The Federal Government Has Trust Responsibilities In The Management Of Tribal Trust Resources

From the beginning of the Republic, the trust relationship has permeated and defined the United States'

dealings with Indian tribes. The Court first acknowledged the trust relationship nearly 170 years ago in the "Cherokee cases" when it addressed whether Georgia statutes applied to persons residing on lands secured to the Cherokee Tribe by federal treaties. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), Justice Marshall found that the Cherokee Nation was "a distinct political society," but held that tribes were "more correctly, perhaps, . . . dominated domestic dependent nations," and that "their relation to the United States resembles that of a ward to his guardian." *Id.* at 16-17. In the second Cherokee case, *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832), the Court again held that the United States had assumed the duty in the Cherokee treaties and relevant federal statutes to manage Indian dealings and protect tribal lands and rights to self-government. *See id.* at 556-59. The Court construed the treaties with the Cherokee Tribe and emphasized that its right "to all the lands within those [territorial boundaries] . . . is not only acknowledged but guaranteed by the United States." *Id.* at 561-62.

Since the Cherokee cases, the Court has developed an exhaustive body of precedent confirming and defining the trust relationship.[2] Subsequent decisions have

---

[2] *See, e.g., Fellows v. Blacksmith*, 60 U.S. (19 How.) 366 (1857); *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Tiger v. Western Investment Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665 (1912); *United States v. Nice*, 241 U.S. 591 (1916); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339 (1941); *Tulee v. State of Washington*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286 (1942); *United States v. Mason*, 411 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199 (1974); *Morton v. Mancari*, 417 U.S. 535 (1974); *United States v. Sioux Nation*, 448 U.S. 371 (1980); *Nevada v. United States*, 463 U.S. 110 (1983); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

established that the federal-tribal trust relationship constitutes both a basis for and a limitation on congressional authority over tribes and tribal interests. *See, e.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977); *Morton v. Mancari*, 417 U.S. 535, 555 (1974); *United States v. Kagama*, 118 U.S. 375 (1886). Moreover, modern case law has determined that, due to the trust relationship, federal statutes should be interpreted liberally as they affect tribes. *See Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Also, the Court has held that an act of Congress will not be construed to extinguish Indian rights unless that intent is clearly and plainly expressed. *See United States v. Dion*, 476 U.S. 734, 738-40 (1987). Finally, the Court has long confirmed the federal government's unique trust responsibility regarding Indian lands and resources. *See United States v. Mitchell*, 463 U.S. 206 (1983).[3]

---

[3] For most tribes, governmental control over Indian lands and resources exists because their lands and resources are owned by the United States interest for the benefit of Indian tribes. The United States holds legal title to the resources, while the tribes hold equitable or beneficial title. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939); *Jones v. Meehan*, 175 U.S. 1, 4 (1899). However, even lands which are owned in fee but restricted against alienation by federal law are " 'subject to the legislation of Congress enacted in the exercise of the government's guardianship' over Indian tribes and their property." *United States v. Candelaria*, 271 U.S. 432, 440 (1926) (quoting *United States v. Sandoval*, 231 U.S. 28, 48 (1913)); *United States v. Ramsey*, 271 U.S. 467, 470-71 (1926).

Congress has likewise specifically recognized and sought to carry out federal trust obligations regarding Indian lands and resources. For example, in the Federal Trade and Intercourse Acts, *see, e.g.*, Act of March 30, 1802, § 12, 2 Stat. 139, 143 (codified at 25 U.S.C. § 177), Congress acted to "protect[ ] the rights of Indians to their properties." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 239 (1985). More recently, Congress defined trust responsibilities of the Secretary of the Interior. 25 U.S.C. § 162(d). Congress has also provided for federal representation of tribal trust interests in litigation. 25 U.S.C. § 175. Other federal statutes recognize the government's fiduciary obligation of management and representation regarding numerous specific tribal assets and resources.[4]

The Executive Branch has also recognized and reaffirmed its fiduciary role regarding management of tribal trust assets and resources. Numerous Presidents over the past thirty years have committed to the government-to-government relationship between federal and tribal governments. *See* Executive Order No. 13,175 of November 6, 2000, "Consultation and Coordination with Indian Tribal Government"; Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (1994); Statement Reaffirming the Government-to-Government Relations with

[4] *See, e.g.*, 25 U.S.C. §§ 162(d)(1)-(7) (concerning trust funds), 323-26 (rights-of-way), 396, 396a-96g (mining leases), 406-07 (timber sales), 415-15d (leases for public, religious, educational, recreational, residential, and business purposes), 2101-08 (mineral development agreements), 3100-20 (forest management); 30 U.S.C. §§ 1701-57 (concerning royalty management systems).

Native American Tribal Governments Between the Federal Government and Indian Tribal Governments, 1991 Pub. Papers 662; Statement on Indian Policy, 1993 Pub. Papers 96; Special Message to the Congress on Indian Affairs, 1970 Pub. Papers 564. The Department of the Interior has also specifically recognized its fiduciary obligations regarding management of tribal resources. *See* Dep't of Interior, Departmental Manual, pt. 303, ch. 2; *id.* pt. 512, ch. 2.

2. The United States Particularly Bears Comprehensive Trust Duties Regarding Tribal Water Rights

In this case there can be no question that a trust relationship exists between the Tribes and the United States regarding the United States' representation of the Tribes' federally reserved trust water rights. As the Court explained in *United States v. Mitchell*, 463 U.S. 206 (1983):

> [A] fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). "[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

Id. at 225 (citing *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Cl.Ct. 1980)). Here, just as in *Mitchell*, all

the elements of a common law trust are present. The United States (fiduciary) is managing the trust property (federally reserved water rights) of the Indian beneficiary (the Klamath Tribes). *See* Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims, 55 Fed. Reg. 9,223 (Dep't Interior, 1990) ("Criteria and Procedures") (stating that "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians").

Moreover, as Congressional acts mandate, and many of the Court's opinions recognize, the United States' representation of Indian water rights is comprehensive. The federal government may bring suit on behalf of the Indians to determine tribal rights to their water resources. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976); *Arizona v. California*, 373 U.S. 546 (1963). Indeed, with Congress' explicit waiver of sovereign immunity under the McCarran Amendment, 43 U.S.C. § 666, the United States must defend tribal water rights in a state general stream adjudication if sued – as is the case here – even if the tribes are not themselves parties to the adjudication. And, the United States' representation as trustee for the Indians is binding on the Indians. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 566 n.17 (1983); *see also Heckman v. United States*, 224 U.S. 413 (1912). Thus to assure proper federal representation of tribal trust interests the United States must have the ability to communicate confidentially with the beneficiary tribes.

Indian tribes are bound by the United States' representation of their rights even if the outcome is detrimental to their interests. In *Arizona v. California*, 460 U.S. 605

(1982), the United States was barred from seeking recalculated water rights for Indian lands that it had failed to present in earlier litigation. Even though the tribes were not parties to the prior proceedings, neither the tribes nor the United States were permitted to reopen the litigation in order to vindicate the tribes' rights. *Id.* at 626-27. More recently, in *Nevada v. United States*, 463 U.S. 110 (1983), the government and the tribe were barred by principles of res judicata from seeking additional water rights for the reservation for fishing purposes, where the government had in an earlier proceeding sought only water for irrigation purposes. *Id.* at 134.

The United States' comprehensive management and control of tribal water resources is also evident in practice. Currently, nearly fifty Indian tribes and pueblos, including many amici, are in litigation or negotiation to establish or implement tribal water rights. In each of these cases, the United States participates in its capacity as fiduciary on behalf of the tribes and pueblos. At present, the United States has established 36 federal negotiating teams to work directly with tribes in settling issues of tribal water rights. *See generally* Criteria and Procedures. Specifically, here, the Klamath Basin Tribes have been required to rely, for better or worse, on the federal government to protect their interests in a state water adjudication and in administrative proceedings and the Tribes and the federal government have been working together in these contexts for at least the past thirteen years.

The established, comprehensive fiduciary relationship concerning management of tribal resources, particularly the Tribes' water resources here, must be considered in assessing this case.

B. The Trust Relationship Requires That The United States Communicate And Communicate Confidentially With Tribes About Tribal Trust Resources

Congressional Acts, Executive Orders, and Departmental memoranda all mandate that the United States consult with Indian tribes on the complex issues regarding the establishment, management, and protection of trust property.[5] Also the fact that the United States holds the resources in trust for the tribes mandates that there be communications between the United States and the tribes about these resources as it would be illogical and patently unfair for one interested party to make decisions about resources without consulting the other.

The fact that the United States holds the resources in trust for the tribes and can legally bind tribes by representing their interests in court necessitates that such communication be open and frank and not accessible by third parties. Ultimately, the trustee cannot be expected to

[5] *See, e.g.*, 2 U.S.C. § 1534(a) (allowing tribal governments to provide meaningful and timely input in the development of regulatory proposals); 25 U.S.C. § 476, (providing for tribes "to prevent the sale, disposition, lease, or encumbrance of tribal lands, or other tribal assets without the consent of the tribe."); Executive Order No. 13,084, 3 C.F.R. 150, *reprinted at* 25 U.S.C.A. § 450, Hist. Notes (West Supp. 2000) (ordering Federal agencies to consult meaningfully with Indian tribes regarding "matters that significantly or uniquely affect their communities" or which "relat[e] to . . . trust resources."); Secretarial Order No. 3215 (Apr. 28, 2000) (allowing for "[c]ommunicat[ion] with beneficial owners regarding the management and administration of Indian trust assets."); Dep't of Interior Manual, pt. 512, § 2.2 (1995) (requiring that the Department provide confidentiality assurances regarding consultations with tribes about tribal trust resources).

administer trust resources in a way that satisfies, for purposes of treaties, Executive Orders, and statutes, indeed, in a way that satisfies even the most rudimentary trusteeship, unless it is able to communicate frankly with the Tribes.[6]

As the Court has consistently recognized, when the federal government has control or supervision over Indian resources, its actions must generally be guided by trust principles. *See United States v. Mitchell*, 463 U.S. 206, 226 & n.31 (1983); *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942); *United States v. Creek Nation*, 295 U.S. 103, 110 (1935). Indeed, common law fiduciary duties remain even when Congress has imposed conflicting representational duties on the federal government. *Arizona v. California*, 460 U.S. 605, 626-27 & n.20 (1983) (noting that tribes might sue the government for breach of fiduciary duties when the government fails to represent tribes adequately). In *Nevada v. United States*, 463 U.S. 110, 143, 145

[6] Other practical considerations also require communication and confidential communication, particularly where the tribe relates valuable information about the trust resources to the federal government. Tribes may have knowledge and expertise rising oftentimes from their time immemorial ownership of the resources that the United States does not have. Also, tribes may have knowledge based on their proximity and familiarity to the resources that the United States does not have. For instance, in the case here, the Klamath Basin Tribes have lived for millennia within the watershed, while their federal trustees are located hundreds of miles away from the water source and the Tribes and is not organized or staffed to properly manage trust resources without communicating with the Tribes themselves.

n.16 (1983), the Court did not discard the fiduciary standards but held that the federal government must respect each of its congressionally imposed obligations and that it does not automatically breach its duties to tribes solely by representing potentially conflicting interests.

Thus common law fiduciary principles must provide a starting point and guide to application of the trusteeship in the instant case. On this count, "[t]he most fundamental duty owed by the trustee to the beneficiaries of the trust is the duty of loyalty . . . to administer the trust solely in the interest of the beneficiaries." *Pegram v. Herdrich*, 120 S.Ct. 2143, 2152 (2000) (quoting 2A Austin W. Scott & William F. Fratcher on Trusts § 170 at 311 (4th ed. 1987)). *Accord NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981); Restatement (Second) of Trusts § 170 (1959); George G. Bogert & George T. Bogert, Law of Trusts and Trustees § 543 at 217-19 (2d rev. ed. 1993). As part of the duty of loyalty, a trustee may not "disclose to a third person information which he has acquired as trustee where he should know that . . . such disclosure would be detrimental to the interest of the beneficiary." Restatement § 170 cmt. s. *Cf. Indian Law Resource Ctr. v. Dep't of the Interior*, 477 F. Supp. 144 (D.D.C. 1979) (relying on the above authority in applying FOIA Exemption 4 to documents that would prejudice tribal interests if disclosed). Indeed, the duty of confidentiality necessarily attaches to a trustee's role as an agent for beneficiaries.[7]

---

[7] Trustees such as the United States act as agents based on their duties to represent beneficiaries adequately, honestly, and in good faith, *see Air Line Pilots Ass'n v. O'Neil*, 499 U.S. 65, 75 (1991), and to enforce claims and defend actions that affect the trust corpus, *see generally* Restatement §§ 177, 178; Scott §§ 177, 178.

A second relevant principle is that a trustee must exercise reasonable care and skill to preserve the trust property and make it productive. *See generally* Restatement (Second) of Trusts §§ 174-76, 181; Scott §§ 174-76, 181; Bogert §§ 541, 582. As part of this duty of care, a trustee must "acquaint[ ] himself . . . with the nature and circumstances of the trust property," Restatement § 174 cmt. c, and must "seek[ ] . . . qualified assistance [and] . . . . consider[ ] . . . the advice of specialists or experts where necessary to make informed decisions." Bogert § 541 at 171; *accord Pension Fund v. Cent. Transp. Inc.*, 472 U.S. 559, 572 (1985) ("fundamental common-law duties . . . encompass[ ] 'determin[ing] exactly what property forms the subject-matter of the trust.' ") (quoting Bogert § 583, at 348); *see also* Bogert § 583 at 352. Taken together, the duties of loyalty and care mandate consultation and confidentiality regarding federal management of tribal trust resources.

C. FOIA Does Not Abrogate Tribal Rights To Confidential Consultations With The United States About Tribal Trust Resources

In this case FOIA must be applied consistently with the government's fiduciary obligations regarding management of the Tribes' trust resources.[8] As the Court has

---

[8] In interpreting the applicability of FOIA in this case, the court of appeals cited *Skokomish Indian Tribe v. Federal Energy Regulatory Comm'n*, 121 F.3d 1303, 1308 (9th Cir. 1997), for the proposition that the government must act in the context of governing statutes, and "while it must act in the interests of the tribes, it may not afford them greater rights than they would have under the regulatory scheme." Pet. App. at 10a. While this may be true, this is not the principle that governs in this case. The correct inquiry here is whether FOIA, a statute of general

held time and again, Congress cannot abrogate Indian rights when it passes general laws unless it specifically considers those rights, and affirmatively decides to abrogate them. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968); *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 353-54 (1942); *United States v. Payne*, 264 U.S. 446, 448 (1924). This limitation on federal action is especially important where an incorrect interpretation of FOIA would result in the evisceration of a fundamental element of the well-established trust relationship: confidential communications between trustee and beneficiary about trust resources.

In *United States v. Dion*, 476 U.S. 734 (1986), the Court discussed in depth the test to determine whether a statute may be construed as abrogating a tribal right. In that case, the question was whether Congress had statutorily abrogated a tribal member's treaty right to hunt eagles:

> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. *Cohen* 223; *see also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353, 62 S.Ct. 248, 255, 86 L.Ed. 260 (1941). "Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights. . . . " *Washington v. Washington Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690, 99 S.Ct. 3055, 3077, 61 L.Ed.2d 823 (1979). We do not construe statutes as abrogating treaty rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S. 404, 412, 88 S.Ct. 1705, 1711; in the absence of explicit statement, " 'the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.' " *Id.*, at 413, 88 S.Ct., at 1711, *quoting Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160, 54 S.Ct. 361, 367, 78 L.Ed. 695 (1934). Indian treaty rights are too fundamental to be easily cast aside.

applicability, operates to abrogate the trust relationship between the United States and Indian tribes with respect to these documents.

Id. at 738-39 (footnote omitted). In order to find that a statute of general applicability abrogates a tribal right, therefore, there must be "clear evidence that Congress actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating" those rights. *Id.* at 740.

The United States' role as trustee, mandated by the Court's decisions, Acts of Congress, and Executive orders, and common law trust principles has embedded in it the right to confidential communications. Such confidential communications with Indian tribes must be guarded as jealously as the treaty rights at issue in *Dion* were guarded. These communications, like the hunting right in *Dion*, "[are] too fundamental to be easily cast aside." *Dion*, 476 U.S. at 739.

This Court has not limited application of Indian rights to specific treaties even though the fundamental principles outlining those rights may have originated in a treaty case. *See* Felix S. Cohen, Handbook of Federal Indian Law, 224 (1982 ed.) ("in implementing the federal-tribal relationship Congress has not drawn distinctions between treaty tribes and nontreaty tribes."). In fact, the Court has not limited to treaties the canon of construction that Indian treaties are entitled to liberal construction. *See Jones v. Meehan*, 175 U.S. 1 (1899). As long ago as *Choate v. Trapp*, 224 U.S. 665 (1912), the Court specifically held that this canon of construction – given the "universality of th[e] rule" – also applies to the interpretation of ambiguous statutes. *Id.* at 675; *see also* Cohen at 224 ("Statutes,

agreements, and executive orders dealing with Indian affairs have been construed liberally in favor of establishing Indian rights."). Likewise, the Court firmly has rejected the notion that treaty reservations are to be distinguished from Executive Order or statutory reservations. Rather, the rights of Indian tribes because of reservation status vest and are protected no matter how the reservation was created. *See Dion*, 476 U.S. at 745 n.8. Finally, while this Court first relied on treaty language in holding in that an Indian's income was not subject to state taxation where that Indian both lived and worked on her reservation, *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 165-66 (1973), that rule has never been limited to specific treaty situations or "treaty tribes." Rather, the rule against state taxation of Indians within Indian country is a *per se* rule applying to all Indians within all Indian country. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1985); *County of Yakima v. Yakima Nation*, 502 U.S. 251, 267 (1992).

Accordingly, unless Congress specifically considered the trust relationship and its essential component of confidentiality and determined to abrogate them, FOIA cannot be read here to diminish the trust relationship. There is no indication whatsoever that in enacting FOIA Congress considered, much less expressed an intent to eliminate the confidentiality of communications between trustee and beneficiary or adversely affect the trust relationship in any way. Even if it could be inferred that Congress so intended, it is clear that such an implication is insufficient grounds for applying FOIA in a way that sabotages the relationship. Because Congress did not explicitly intend for FOIA to abrogate the trust relationship or any element of it, a proper reading of the statute must leave the relationship intact.

II. DISCLOSURE OF THE DOCUMENTS IN THIS CASE CONTRAVENES EXEMPTION 5 OF THE FREEDOM OF INFORMATION ACT AND MAKES INDIAN TRIBES THE ONLY PARTIES IN THE UNITED STATES UNABLE TO RELY ON DISCOVERY PRIVILEGES

A. Congress Intended To Ensure Open And Frank Government Discussions By Protecting Executive Deliberations, Attorney-Client Communications And Work Product Under FOIA Exemption 5

Because Congress recognized " 'that legitimate governmental and private interests could be harmed by release of certain types of information,' " *United States v. Julian*, 486 U.S. 1, 9 (1988) (quoting *FBI v. Abramson*, 456 U.S. 615, 621 (1982)), Congress created nine exemptions under FOIA. Exemption 5, the specific exemption at issue in this case, protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." 5 U.S.C. § 552(b)(5). As this Court has made clear, Congress enacted Exemption 5 to "ensure frank and open discussion and hence efficient governmental operations," *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 802 (1984), concerning "legal or policy matters." *FTC v. Grolier Inc.*, 462 U.S. 19, 23 (1983). *See also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975). On this point, the legislative history indicates that:

> [I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that

> efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl."

S. Rep. No. 89-813 at 9 (1965). *Accord* H.R. Rep. No. 89-1497 at 10 (1966).

In order to achieve the goal of frank and open government communications, Exemption 5 specifically protects documents that would "normally [be] privileged in the discovery context." *Julian*, 486 U.S. at 12. Among other privileges, the Court has applied Exemption 5 to protect: "(i) the generally recognized privilege for confidential intra-agency advisory opinions, disclosure of which would be injurious to the consultative functions of the government (sometimes referred to as 'executive [or deliberative process] privilege'), and (ii) the attorney-client and attorney work-product privileges generally available to all litigants." *Sears*, 421 U.S. at 149.

Accordingly, for documents to qualify for protection under Exemption 5, they must both constitute "inter-agency or intra-agency memorandums or letters" and be privileged. *See Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 352 (1979). The documents at issue here meet both of these criteria and as a result are not disclosable.

B. Communications Between The Federal Government And Tribes Regarding Tribal Trust Resources Fall Within Exemption 5

1. Regarding The Management Of Tribal Trust Assets, Federal-Tribal Communications Meet The Functional Test Of Exemption 5

Tribes of course are not "agencies" within a strict reading of Exemption 5's "inter-agency or intra-agency"

language. However, Congress did not intend the exemption to be construed so strictly as to place form over substance. *See* S. Rep. No. 89-813 at 9 (cautioning that exemption should be viewed only "as narrowly as consistent with efficient government operation."). Reading Exemption 5 accordingly, amici submit that the federal-tribal trust relationship and the specific role the Tribes' played in generating the communications here at issue bring these documents squarely within the ambit of Exemption 5.

The courts of appeals have developed what is now known as the "functional test" under FOIA Exemption 5 to deal with instances where federal agencies' have "encountered problems outside their ken" and turned to nonagency experts. *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1162 (D.C. Cir. 1987). *Accord Texas v. Interstate Commerce Comm'n*, 889 F.2d 59, 61 (5th Cir. 1989); *Formaldehyde Inst. v. Dep't of Health & Human Serv.*, 889 F.2d 1118, 1123-24 (D.C. Cir. 1989) (developing and applying functional test). Notably, this test and its "common sense interpretation of 'intra-agency[,]' . . . accommodate the realities of the typical agency deliberative process [and] has been consistently applied by the courts." *Ryan v. Department of Justice*, 617 F.2d 781, 790 (D.C. Cir. 1980).

Under the functional test, the source of the communications at issue is not determinative. Instead, the functional test inquires as to the purpose served by those communications, within the context of the administrative process that created them, to determine whether they served a lawfully privileged government function. *See generally Formaldehyde Inst.*, 889 F.2d 1122-23. Accordingly,

> [w]hether the author [of the subject communications] is a regular agency employee or a temporary consultant is irrelevant; *the pertinent element is the role, if any, that the document plays in the*

> *process of agency deliberations*. If the information communicated is deliberative in character it is privileged from disclosure, notwithstanding its creation by an outsider.

CNA Financial Corp., 830 F.2d at 1161-62 (emphasis added).

The functional test rises fully and faithfully from Congress' purposes in enacting Exemption 5 of allowing frank and open discussions in government decisionmaking and recognizes Congress' practical intent that the terms "inter-agency" and "intra-agency" not be read as "rigidly exclusive." *Ryan*, 617 F.2d at 790; *accord CNA Financial Corp.*, 830 F.2d at 1161-62. While it intended courts to read all FOIA exemptions narrowly, Congress specifically noted that Exemption 5 be read only "as narrowly as consistent with efficient government operation." S. Rep. No. 89-813 at 9. *Accord Grolier*, 462 U.S. at 23. Above all, Congress intended its exemptions to craft "workable standards," not absolute requirements that would place form over substance. S. Rep. No. 89-813 at 5.

While this Court has not yet formally embraced it, the functional test is consistent with the Court's prior decisions which have recognized that "the public's access to internal memoranda [should] be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies." *EPA v. Mink*, 410 U.S. 73, 91 (1973). As the Court noted in *Sears*, "the function of the documents in issue in the context of the administrative process which generated them" is "crucial" to determining whether Exemption 5 applies. 421 U.S. at 136. *See also CNA Financial Corp.*, 830 F.2d at 1161 ("[T]he pertinent element is the role, if any, that document plays in the process of agency deliberations."). Indeed, instead of adhering to a strict definition of the

statutory term "intra-agency memorandum," Justices Scalia and O'Connor and White have recognized that it is not only "permissible" but

> desirable . . . and much more in accord with the purpose of [Exemption 5] to regard as an intra-agency memorandum one that has been received by an agency to assist it in the performance of its own functions, from a person acting in a governmentally conferred capacity other than on behalf of another agency. . . .

Julian, 486 U.S. at 18 n.1 (Scalia, J., dissenting).

Two of the most analogous factual examples of application of the functional test to the situation here are found in *Public Citizen, Inc. v. Dep't of Justice*, 111 F.3d 168 (D.C. Cir. 1997), and *Ryan*. In *Public Citizen*, the court addressed whether Exemption 5 shielded documents shared between former Presidents and in *Ryan*, it addressed whether Exemption 5 shielded documents prepared by United States Senators. In both cases, the court held that the documents created by these non-agency actors were exempt.

Clearly, neither Senators nor ex-Presidents are agency employees. Nevertheless, the relationships that these individuals have with federal agencies requires that the agencies communicate confidentially with them about governmental functions. As the court in *Public Citizen* expressly noted, "the former President in this context can hardly be viewed as an ordinary private citizen. . . . 'The privilege is not for the benefit of the President as an individual, but for the benefit of the Republic.' " 111 F.3d at 170 (quoting *Nixon v. Administrator of General Services*, 433 U.S. 425, 448-49 (1977)). Protecting communications generated by such persons outside of federal agencies acknowledges their unique legal relationships with those

agencies and comports with Congress' intent to protect governmental functioning vis-à-vis those persons.

In the same way, federal agencies have a unique relationship with Indian tribes that requires open and frank communications with tribes to enable the agencies to properly carry out their governmental responsibilities toward tribes, for, as explained above, the relationship between the United States and Indian tribes is a trust relationship. Because of the function of documents exchanged in the exercise of the government's trust duty, the documents in this case meet the functional test for "inter-agency or intra-agency" documents.

2. The Documents At Issue Here Concern Executive Deliberations And Attorney-Client Communications And Are Thus The Kind Of Documents Normally Protected By Exemption 5

The Court has applied Exemption 5 to protect the executive deliberative process privilege, the attorney-client privilege, and the work product privilege. *See Sears*, 421 U.S. at 150-54. The executive privilege protects federal agencies' predecisional reports, working papers, and communications, *Merrill*, 443 U.S. at 353, as well as "documents 'reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated.' " *Sears*, 421 U.S. at 150 (citation omitted). This privilege thus serves to "protect[ ] the 'decision making processes of government agencies" and "to prevent injury to the quality of agency decisions." *Id.* at 151. *Accord* S. Rep. 89-813 at 9 ("[I]t would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny."); H.R.

Rep. 89-1497 at 9. In turn, the attorney-client privilege protects "the giving of information to the lawyer to enable him to give sound and informed advice[,]" and extends to communications with non-management personnel "who . . . possess the information needed by the . . . lawyers." *Upjohn Co. v. United States*, 449 U.S. 383, 390, 391 (1981). Finally, because "[p]roper presentation of a client's case demands that [an attorney] assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference[,]" the attorney work-product privilege provides that "written materials obtained by . . . counsel with an eye toward litigation are necessarily free from discovery in all cases." *Hickman v. Taylor*, 329 U.S. 495, 510 (1947). Indeed, work product is protected under FOIA Exemption 5 "without regard to the status of the litigation for which it was prepared." *Grolier*, 462 U.S. at 28.

The documents here clearly qualify for such privileges. First, the documents fall within the executive deliberative process privilege because disclosure would be harmful to proper federal management of tribal resources. As explained in Section I, *supra*, numerous legal and practical considerations require federal-tribal consultations regarding management of tribal resources. These consultations are necessary for properly informed and considered federal deliberations and decisions regarding tribal resource management. Failure to protect the confidentiality of these consultations would have a chilling effect on these frank discussions and lead to wasted federal efforts to substitute for tribal knowledge and insights and/or uninformed federal deliberations and decisionmaking. Because both of these possible consequences would be *"detriment[al to] the decisionmaking*

process[,]" *Id.* at 151 (citation omitted and emphasis in original), these consultations are protected under the deliberative process privilege of FOIA Exemption 5.

In addition, many federal-tribal resource consultations qualify for protection under the attorney privileges protected by FOIA Exemption 5. Resource management issues often arise in the context of competing claims to those resources, and litigation results. As explained above, both common law trust principles and applicable statutes and precedents require federal legal representation for Indian resource interests. In these situations where litigation is possible or ongoing, the federal government acts as the attorney for tribes and federal-tribal consultations necessarily constitute either attorney-client communications or attorney work-product.

C. Neither The Tribes' Interest In The Subject Matter Of The Department's Deliberations Nor The Possibility Of Federal-Tribal Disputes Undermines Application Of FOIA Exemption 5

In their Brief in Opposition, Respondents raised two points which they contend inform the analysis here. First, Respondents argue that "Tribes are non-neutral, interested parties." Br. in Opp. at 12-13. Second, Respondents state that the "Tribes, moreover, are past, present, and potential future adversaries of Interior with respect to the decisions being made in KPOP and the adjudication. *See Id.* In part based on these arguments, the court of appeals held that the documents here were subject to disclosure. However, as shown below, these points do not carry the weight both Respondents and the court of appeals would place on them.

1. Tribal Interest In The Subject Of The Communications Does Not Render Their Communications Ex Parte

Indian tribes have an interest in their own trust assets. The court of appeals below raised the concern that such an interest made communications between the United States and the Tribes in some way similar to ex parte communications. Pet. App. at 10a. This concern is misplaced, however, particularly where the United States is a litigant on the Tribes' behalf in the state water rights adjudication, and even where the United States acts as an administrative decision maker in the KPOP process. In both the adjudication and the administrative proceedings, the government is fulfilling the same role as it communicates with the Tribes: it is acting to gather information and develop legal theories so that it may properly protect its own water – the water it holds in trust for the Tribes. In the adjudication process, the United States is communicating with the Tribes so that it may internally determine the extent, quantity and use of its own federal water rights held in trust for the Klamath Tribes and so that it can advance and defend those rights in the adjudication. Because the state court adjudicates these claims, there is certainly nothing ex parte to consider. In case of the general stream adjudication, the United States is acting solely as the Tribes' representative and co-party.

On the KPOP front, the United States is communicating with the Tribes for the same reasons it is on the adjudication front. The Bureau of Indian Affairs is communicating so as to internally determine the extent, quantity and use of its own federal water rights held in trust for the Klamath Tribes so that it can advance and protect those rights in the administrative process. The fact that the Bureau of Reclamation acts as ultimate decisionmaker

and must consider other interests, such as those of the Respondents, does not diminish the government's responsibility as fiduciary for the trust resources. While both Bureaus are within the Department of the Interior, as the Court made clear in *Nevada*, it is the obligation of the federal government "to carry water on two shoulders." 463 U.S. at 128. In this case, the government's obligation requires it to act as both owner (and hence trust representative) as well as conducting KPOP operations consistent with the Tribes' federally reserved water rights at issue.[9] Ex parte concerns are thus also misplaced here.

2. The Tribes Are Not Adversaries Of The Federal Government In This Case

Respondent has cited *County of Madison v. United States Dep't of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981), as precedent for the proposition that the documents at issue here do not fit within the functional test. *See* Br. in Opp. at 12-13. Although *County of Madison* did indeed address the applicability of Exemption 5 in an Indian law context, it was a context radically different from the one at issue here. There, the tribes were actually litigating against the United States and thus the court expressly found that the

[9] *Nevada* described the salient distinction between such federal Indian trust water rights and the water rights associated with a federal irrigation project. As to the latter, *Nevada* emphasized that, under Reclamation law, the water was to be used not by the government but by the land owners, because ownership of the rights would not remain with the government but would pass to the land owners. In contrast, the federal Indian trust water rights remain permanently federal reserved water rights. Recognition of this "in-house" characteristic of federal Indian water rights negates any issue with tribal "interest" to the case here. *Nevada*, 463 U.S. at 126.

tribes were "adversaries, not coopted colleagues" of the government. The court suggested that only nonadversarial communications with nonagency personnel are protected by Exemption 5 and that communications arising from an adverse relationship are not protected. As no adversarial relationship between the Tribes and the federal government exists in this case, much less any indication that any of the communications arose from an adversarial relationship, *County of Madison* is irrelevant. *See Public Citizen*, 111 F.3d at 171 ("[T]he potential for an adversary relationship is not enough to negate one of consultation." Even a past adversarial relationship does not, of itself, destroy a presently consultative relationship.)

D. Failure To Apply FOIA Exemption 5 Here Would Sanction Use Of FOIA As A Substitute For Discovery In Contravention Of This Court's Warnings

By enacting FOIA, Congress did not intend to allow parties to subvert the Court's carefully crafted rules governing discovery. "[A] court must be mindful of this Court's observations that the FOIA was not intended to supplement or displace rules of discovery." *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236-39 (1978); *Weber*, 465 U.S. at 801-02). The Court repeatedly has admonished litigants that FOIA is not available as a means to expand discovery beyond the scope available under the federal rules governing discovery. *See Julian*, 486 U.S. at 12 (quoting *Sears*, 421 U.S. at 149, and H.R. Rep. No. 89-1497 at 10). To allow litigants to obtain information under FOIA that is "normally privileged would

create an anomaly that the FOIA could be used to supplement civil discovery. We have consistently rejected such a construction of FOIA." *Weber*, 465 U.S. at 801-02 (citing *Baldridge v. Shapiro*, 455 U.S. 345, 360 n.14 (1982); *Sears*, 421 U.S. at 143 n.10; *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)).

Applying this precedent, the Court should reject the attempt to use FOIA as a tool to circumvent long-established discovery procedures. Because the relevant documents here are privileged from disclosure under the rules of discovery, they should not be subject to disclosure under FOIA. Failure to protect federal-tribal consultations made within the context of governmentally mandated and judicially recognized duties would impermissibly circumvent application of standard discovery privileges to tribes. Without preserving confidentiality here, the United States' ability to discharge its fiduciary obligations to tribes would be seriously impaired and tribes would be placed in a worse position than any other litigant solely because the government acts as their representative. Such a result is contrary to both law and reason.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

TRACY A. LABIN*
Native American Rights Fund
1506 Broadway
Boulder, CO 80302
(303) 447-8760

* *Counsel of Record for all Amici*

CARL ULLMAN
116 Chocktoot
Chiloquin, OR 97624
Additional Counsel for the Klamath Tribe

CURTIS BERKEY
ALEXANDER & KARSHMER
2150 Shattuck Ave., Suite 725
Berkeley, CA 94704
Counsel for Yurok Tribe

THOMAS P. SCHLOSSER
MORISSET, SCHLOSSER, AYER & JOZWIAK
1115 Norton Bldg.
801 Second Ave.
Seattle, WA 98104
Counsel for the Hoopa Valley Tribe; and the Nooksack Indian Tribe

REID PEYTON CHAMBERS
DAVID C. MIELKE
SONSOKY, CHAMBERS, SACHSE, ENDRESON & PERRY
1250 Eye Street, NW, Suite 1000
Washington, DC 20005
Counsel for the Hopi Tribe; Seneca Nation of Indians; Assiniboine and Sioux Tribes of the Fort Peck Reservation; Pueblo of Isleta; Pueblo of Sandia; Pueblo of Zia

JILL E. GRANT, DAN REY-BEAR, JESSICA ABERLY, STEVE GREETHAM
NORDHAUS, HALTOM, TAYLOR, TARADISH & BLADH LLP
500 Marquette Avenue N.W.
Suite 1050
Albuquerque, NM 87102
Counsel for the Jicarilla Apache Tribe; Pueblo of Laguna; Pueblo of Santa Ana; San Juan Pueblo; and Taos Pueblo

ALICE E. WALKER
GREENE, MEYER & MCELROY
Attorneys at Law
1007 Pearl St., Suite 220
Boulder, CO 80302
Counsel for the Walker River Paiute Tribe and the Navajo Nation

TOD J. SMITH
WHITEING & SMITH
Attorneys at Law
1136 Pearl St., Suite 203
Boulder, CO 80302
Counsel for the Ute Indian Tribe of the Uintah and Ouray Reservation; Blackfeet Indian Tribe; Shoshone-Paiute Indian Tribes and San Juan Southern Paiute Tribe

MARK ANDERSON
JACOBSON, BUFFALO, SCHOESSLER & MAGNUSON
246 Iris Park Place
1885 University Ave. West
Saint Paul, MI 55104
Counsel for Bois Forte Band of Chippewa Indians

GARY BROWNELL
Department of Justice
P.O. Box 667
Black River Falls, WI 54615
Attorney General for the Ho-Chunk Nation

JOHN B. CARTER
P.O. Box 278
Highway 93 North
Pablo, Montana 59855
Counsel for the Confederated Salish and Kootenai Tribes

PETER C. CHESTNUT, General Counsel
CHESTNUT LAW OFFICES
121 Tijeras Avenue, N.E., Suite 2001
Albuquerque, NM 8710
Counsel for the Pueblo of San Ildefonso

KATHRYN FOWLER VAN HOOF
VAN HOOF AND ASSOC.
369 Lamourie Road
P.O. Box 339
LeCompte, LA 71346
Counsel for Coushatta Tribe of Louisiana

KRIS M. GOODWILL
13394 W. Trepania Road
Hayward, WI 54843
Counsel for the Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin

DAVID HARRINGTON
Red Lake Nation Legal Department
P.O. Box 369
Red Lake, MN 56671
Counsel for Red Lake Band of Chippewa Indians

DANIEL HESTER
FREDERICKS, PELCYGER & HESTER, LLC
Christopher Plaza
1075 South Boulder Rd., Suite 305
Louisville, CO 80027
Counsel for Confederated Tribes of the Umatilla Indian Reservation

P.J. LABORDE, JR.
THE LABORDE LAW FIRM, LLC
102 Asma Blvd., Suite 100
Lafayette, LA 70508
Counsel for Tunica Biloxi Tribe of LA

RODNEY B. LEWIS
P.O. Box 97
Sacaton, AZ 85247
Counsel for Gila River Indian Community

ROBERT F. MILLS
WYNN & WYNN P.C.
310 Barnstable Road
Hyannis, MA 02601
Counsel for Wampanoag Tribe of Gary Head (Aquinnah)

STEPHEN V. QUESENBERRY, Director of Litigation
CALIFORNIA LEGAL SERVICES
787 North Main Street, Suite D
Bishop, CA 93514
Counsel for the Big Valley Band of Pomo Indians of the Big Valley Rancheria; Big Lagoon Rancheria; Bridgeport Paiute Indian Colony; Chemehuevi Indian Tribe of the Chemehuevi Reservation; Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation; Fort Independence Indian Community of Paiute Indians of the Fort Independence Reservation; Manzanita Band of Diegueno Mission Indians of Manzanita Reservation; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation; Northfork Rancheria of Mono Indians; Paskenta Band of Nomlaki Indians; Quechan Tribe of the Fort Yuma Indian Reservation; Rincon Band of Luiseno Mission Indians of the Rincon Reservation; Round Valley Indian Tribes of the Round Valley Reservation; San Pasqual Band of Diegueno Mission Indians; Smith River Rancheria; Timbosha Shoshone Tribe

GREGORY M. QUINLAN
First National Bank Building
Post Office Drawer 600
Alamagordo, NM 88311-0600
Counsel for the Mescalero Apache

ERIK RAPPAPORT
Law Offices of Ladar & Ladar
507 Polk Street, Suite 310
San Francisco, CA 94102
Counsel for the Cahto Tribe of Indians

MICHAEL TAYLOR
6700 Totem Beach Rd.
Tulalip, WA 98271
Counsel for the Tulalip Tribes

M. EVELYN WOODS
613 Cascade
Boulder, CO 80302
General Counsel for the Shivwits Band of the Paiute Indian Tribe

ABSENTEE SHAWNEE TRIBE OF OKLAHOMA
2025 S. Gordon Cooper Dr.
Shawnee, OK 74801

ALABAMA-COUSHATTA TRIBE OF TEXAS
Rt. 3 Box 640
Livingston, TX 77351

ALABAMA-QUASSARTE OF OKLAHOMA
2025 S. Gordon Cooper Dr.
P.O. Box 1747
Shawnee, OK 74801-8639

BAY MILLS INDIAN COMMUNITY
12140 West Lakeshore Drive
Brimley, Michigan 49715

BISHOP PAIUTE TRIBAL COUNCIL
Paiute Professional Building
50 Tu Su Lane
Bishop, CA 93514

BLUE LAKE RANCHERIA
P.O. Box 428
Blue Lake, CA 95525

Bridgeport Indian Colony
P.O. Box 37
Bridgeport, CA 93517

Cherokee Nation
P.O. Box 948
Tahlequah, OK 74465-0948

Cheesh-Na Tribal Council
Christochina Village Council
P.O. Box 241
Gakona, Alaska 99586

Chicken Ranch Rancheria
P.O. Box 1699
Jamestown, CA 95327

Colusa Indian Community
Cachil Dehe Band of Wintun Indians
3730 Hwy 45
Colusa, CA 95932

Confederated Tribes of Siletz Indians
P.O. Box 549
Siletz, OR 97380

Confederated Tribes of the Warm Springs Reservation of Oregon
P.O. Box C
Warm Springs, OR 97761

The Delaware Nation
P.O. Box 825
Anadarko, OK 73005

Elem Indian Colony
Tribe of Southeastern Pomo Indians
P.O. Box 1997
Clearlake Oaks, CA 95423

Fort Independence Indian Reservation
131 N. Highway 395
Independence, CA 91355

Fort McDowell-Yavapai Nation
P.O. Box 17779
Fountain Hills, AZ 85269-7779

Guidiville Band of Pomo Indians
Guidiville Indian Rancheria
P.O. Box 339
Talmage, CA 95481

Hannahville Indian Community
N. 14911 Hannahville B-1 Road
Wilson, MI 49896

Jamestown S'Kallum Tribe
1033 Olde Blyn Highway
Sequim, WA 98382

Jamul Indian Village
P.O. Box 612
Jamul, CA 91935

Lac du Flambeau Band of Lake Superior Chippewa Indians
P.O. Box 67
Lac du Flambeau, WI 54539

Lower Elwha Klallam Tribe
2851 Lower Elwha Road
Port Angeles, WA 98363

Lower Sioux Indian Community in Minnesota
1885 University Ave.
West Saint Paul, MI 55104

Mashantucket Pequot Tribal Nation
a/k/a Mashantucket (Western) Pequot Tribe
2 Matt's Path
P.O. Box 3060
Mashantucket, CT 06339-3060

Mesa Grande Band of Mission Indians
P.O. Box 270
Santa Ysebel, CA 92070

Miami Tribe of Oklahoma
P.O. Box 1326
202 South Eight Tribes Trail
Miami, OK 74354

Middletown Rancheria
22223 Highway 29 at Rancheria Rd.
P.O. Box 1035
Middletown, CA 95461

Modoc Tribe of Oklahoma
515 G N.W.
Miami, OK 74354

Ninilchik Traditional Council
P.O. Box 39070
Ninilchik, AK 99639

North Fork Rancheria of Mono Indians of California
33173 Rd. 222, Suites 7 & 8
North Fork, CA 93643-0929

Organized Village of Kake
P.O. Box 316
Kake, AK 99830

Peoria Tribe of Indians Oklahoma
P.O. Box 1527
Miami, OK 74355-1527

Pinoleville Tribe of Pomo Indians
367 N. State St., Suite 204
Ukiah, CA 95482

Prairie Band of Potawatomi Nation
16281 Q Road
Mayetta, KS 66509

Pueblo of Jemez
P.O. Box 100
Jemez Pueblo, NM 87024

Ramona Band of Mission Indians
56310 Highway 371, Suite B
P.O. Box 391372
Anza, CA 92539

Resighini Rancheria
P.O. Box 529
Klamath, CA 95548

Santa Clara Pueblo
P.O. Box 580
Espanola, NM 87532

Scotts Valley Band of Pomo Indians
149 N. Main St., Suite 200
Lakeport, CA 95453

Seneca-Cayuga Tribe of Oklahoma
Box 1283
R2301 E. Steve Owens Blvd.
Miami, OK 74355

Shoshone-Bannock Tribes
Fort Hall Business Council
P.O. Box 306
TBC Pima Drive
Fort Hall, ID 83203

Skokomish Indian Tribe
N. 80 Tribal Center Road
Shelton, WA 98584

Stewarts Point Rancheria
1420 Guerneville Road, Ste.3
P.O. Box 6525
Santa Rosa, CA 95403

Stockbridge-Munsee Community
Band of the Mohican Indians
N8476 Moh He Con Nuck Rd.
Bowler, WI 54416

Tuolomne Band of Me-Wuk Indians
P.O. Box 699
Tuolomne, CA 95379

Upper Lake Rancheria
P.O. Box 516
Upper Lake, CA 95485

Ute Mountain Ute Indian Tribe
P.O. Box 128
Towaoc, CO 81334

White Earth Band of Chippewa
P.O. Box 418
White Earth, MN 56591

Wichita and Affiliated Tribes
P.O. Box 729
Anadarko, OK 73005

Native Ecology Initiative, Inc.
P.O. Box 470829
Brookline Village, MA 02447-0829